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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 872

UNITED STATES OF AMERICA, EX REL. SILVIO DARIO DURANTE, PETITIONER

v.

RALPH HOLTON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. i-v) is reported at 228 F. 2d 827. The findings of fact and conclusions of law of the district court (R. 98-101) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1956 (Pet. App. i). A peti-

tion for rehearing was denied on February 7, 1956. The petition for a writ of certiorari was filed on April 17, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a habeas corpus proceeding brought by an alien who has been ordered deported in accordance with Section 241(a)(4) of the Immigration and Nationality Act of 1952 for the commission of two crimes involving moral turpitude, a federal court may inquire as to the validity of a state record of conviction.

2. Whether a plea of guilty made in reliance on a promise of a sheriff that he would be granted probation constitutes a violation of due process where the defendant was represented by an attorney in whom he had confidence when he entered his plea.

STATUTE INVOLVED

Section 241(a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204, 8 U.S.C. (1952 ed.) 1251(a)(4), provides:

> Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective in-

stitution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

STATEMENT

This habeas corpus proceeding was instituted to challenge the legality of a deportation order entered against petitioner who admittedly is an alien convicted of two crimes involving moral turpitude since entry into the United States, and is therefore deportable under Section 241(a)(4) of the Immigration and Nationality Act of 1952, *supra*. The District Court for the Northern District of Illinois dismissed the petition (R. 101) and its action was affirmed on appeal (Pet. App. v).

The pertinent facts may be summarized as follows:

Petitioner entered this country from Canada in 1926 (R. 68). In 1946 he was arrested in Sherman County, Kansas, on a charge of forgery, but escaped from jail while being held on the charge (R. 58-60). He fled to Colorado, but later returned voluntarily (R. 60) and was convicted on a plea of guilty for forgery, jail breaking, and assault with a deadly weapon (R. 84-85). He was represented by an attorney at the time he entered his plea (R. 60, 84). He was given a concurrent sentence not exceeding ten years on the forgery and assault

counts, and not exceeding two years on the jail break count (R. 84-85).

In 1952 petitioner, on a plea of guilty, was convicted in Cook County, Illinois, of burglary, and was sentenced to a term of not less than one year nor more than two (R. 61, 72-73). He was represented by an attorney at the time he entered his plea and was sentenced (R. 72-73).

While in the Illinois State Penitentiary on the sentence for burglary, a warrant dated July 1, 1952 was served upon him in which he was charged with being in the United States in violation of the Immigration Act of 1917 in that he had been sentenced more than once to imprisonment for terms of one year or more for crimes committed in this country which involved moral turpitude, to wit: forgery and burglary (R. 66-67). At a hearing held at the Illinois State Penitentiary on September 24, 1953, petitioner was ordered deported (R. 45).

A petition for a writ of habeas corpus was filed on January 8, 1954 after petitioner was confined at the Cook County Jail, Chicago, Illinois on an order of deportation (R. 3). At a hearing before the District Court for the Northern District of Illinois on January 18, 1954, an order was entered continuing the cause to allow for another hearing by the Immigration Service at which petitioner could be represented by counsel (R. 6-20).[1]

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[1] A postponement of seven months had been previously granted petitioner by the hearing officer on his plea that he had not been able to procure counsel. Further postponement was denied at the September 24, 1953 hearing (R. 3-4).

The reopened hearing took place on January 25, 1954, at which time petitioner was accompanied by his attorney (R. 44, 45). It was continued until March 9, 1954 to allow petitioner's counsel time to investigate a new charge lodged against petitioner to the effect that he was in the United States in violation of Section 241(a)(4) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2-3), since he was an alien who had committed two separate crimes involving moral turpitude since entry (R. 53-54, 55). At the continued hearing (R. 55-65), petitioner stated he was not guilty of the crime of forgery in Kansas (R. 59), that he gave himself up to the police authorities in Denver, Colorado for extradition to Kansas because "they told me if I came back to Goodland, Kansas, they would see that I got a probation" (R. 60). In answer to whether he had pleaded guilty, petitioner stated: "Well, I plead guilty to the assault. They told me that if I plead guilty they'd give me more time and make it more difficult. So I let the attorney handle everything. Like I said, I thought it was going to be a probation so I had confidence in my attorney. The way it turned out I got sentenced. * * *" (R. 60). The special inquiry officer found on the basis of the reopened hearing that petitioner was an alien convicted of two separate crimes involving moral turpitude, committed since entry, and ordered his deportation (R. 39-44). The Board of Immigration Appeals on November 2, 1954 affirmed the order (R. 33-36).

Petitioner, on February 14, 1955, filed an

amended petition for a writ of habeas corpus with the district court (R. 26-28) in which he alleged, *inter alia,* "* * * that before he waived extradition to the State of Kansas he had been promised probation if he returned * * * " (R. 27). The district court sustained the government's position that a habeas corpus proceeding could not be used to attack collaterally a conviction of the State of Kansas (R. 31), and that the only questions before the district court on a writ of habeas corpus in a deportation proceeding was whether the alien had had a fair hearing and whether there was substantial evidence to support the order of deportation (R. 96). The petition was dismissed (R. 100).

On appeal, the Court of Appeals did go behind the Kansas record of conviction to consider whether it was the result of proceedings lacking in due process (Pet. App. ii-v). It noted that the petition for a writ of habeas corpus did not state whether the promise of probation was made by one with authority, either real or claimed, to do so, and commented that the legal effects would be different if the person had no authority to speak for the prosecution (Pet. App. iv). The Court of Appeals concluded that neither prosecution upon which the deportation order was based deprived petitioner of any rights under the Fourteenth Amendment. Accordingly it affirmed the judgment below (Pet. App. v).

Petitioner sought to obtain a rehearing in the Court of Appeals, and filed an affidavit naming the sheriff and prosecuting officer of Sherman County, Kansas, as the persons, who, through his attorney,

informed him that they would recommend probation if he would waive extradition from Colorado (Pet. 8). He also stated in his petition that he was personally assured by the sheriff, before he entered his plea, that he would be granted probation if he pleaded guilty and in reliance on this assurance, he did plead guilty (Pet. 8). The rehearing was denied.

ARGUMENT

The affirmance by the Court of Appeals was based upon its consideration of the merits of the Kansas and Illinois convictions of petitioner. Thus, in effect, it was a ruling that the court might properly look behind a state record of conviction while considering a petition for a writ of habeas corpus in a deportation proceeding. In this respect, we believe the court below granted petitioner more than was his due, although we agree with its conclusions as to the merits of the state court convictions.

1. Petitioner does not deny that he is an alien of the class designated as deportable by the applicable statute, or that he has been accorded a fair hearing on his deportability by the immigration officials. By this habeas corpus proceeding, he challenges the legality, not of the immigration hearing, but of his convictions in the courts of Kansas and Illinois, which he never challenged by appeal or other legal proceedings in the tribunals of those states. Without giving the courts of those states an opportunity to determine whether he was denied due process in the criminal trials, he now asks that the federal courts decide that issue in this proceeding.

It is settled that a habeas corpus proceeding attacking an order of deportation does not open up for consideration the original judgment of conviction upon which the deportation order is based. *Pino* v. *Nicolls*, 215 F. 2d 237, 247 (C.A. 1);[2] *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369, 372-373 (C.A. 2), certiorari denied, 333 U.S. 876; *United States ex rel. Knauer* v. *Jordan*, 158 F. 2d 337, 339 (C.A. 7), certiorari denied, 331 U.S. 810; *Dengeleski* v. *Tillinghast*, 65 F. 2d 440, 441 (C.A. 1); *United States ex rel. Robinson* v. *Day*, 51 F. 2d 1022-1023 (C.A. 2); *Gib* v. *Weedin*, 8 F. 2d 489, 490 (C.A. 9). This point was recently discussed in the Respondent's Brief in Opposition in *Marino* v. *Holton*, No. 698, October Term 1955, certiorari denied on April 2, 1956. As the Respondent's brief in *Marino* pointed out at page 10, to hold that the Immigration and Naturalization Service cannot rely upon the record of a conviction found in the public papers of a state, but must instead assume the judicial task of reviewing all convictions upon which it bases deportation orders, would impose upon that Service an unreasonable, if not impossible, administrative burden of ascertaining *de novo* whether the alien is in fact guilty of the offenses of which he has been convicted.

Petitioner does not assert that Kansas or Illinois lacked procedures whereby he could have chal-

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[2] Reversed, *sub nom. Pino* v. *Landon*, 349 U. S. 901, in a *per curiam* decision that the conviction had not reached a sufficient degree of finality to support a deportation order.

lenged his alleged denial of constitutional rights. Indeed, he states that even now he plans to seek relief in Illinois from his conviction there on a writ of *coram nobis* (Pet. 12). The fact that Kansas may not have a procedure which permits a defendant to attack a sentence which has been fully served,[3] does not establish lack of due process with respect to the Kansas conviction. Many rights are lost if they are not timely asserted. Cf. *Sunal* v. *Large*, 332 U.S. 174. And petitioner, who was represented by counsel at the time of his plea in Kansas, and who served forty months (R. 60), had ample time while he was serving his sentence to attack his conviction if he had any basis for doing so.

2. In any event, as the Court of Appeals held, petitioner presents no grounds which would invalidate the Kansas conviction, the only one attacked in this Court (Pet. 7). That is so even if the petition for habeas corpus be treated as having been supplemented by the allegations contained in the affidavit attached to the petition for a rehearing in the Court of Appeals. In that affidavit, petitioner asserted that the sheriff and prosecuting officer of the county where he was charged with commission of the crimes of forgery, assault, and jail break, promised to recommend probation if he returned to Kansas (Pet. 8). He did not assert that they broke their alleged promise, but only that the

[3] The method of collateral attack on Kansas convictions is by habeas corpus, and therefore dependent on custody. Kans. Stat. (1949) 60-2201.

judge did not give him probation when he did return to stand trial. He further asserted that the sheriff personally assured him, before he entered his plea, that he would be granted probation if he pleaded guilty, and in reliance on that assurance he did so (Pet. 8).

Petitioner was represented by an attorney when he entered his plea (R. 60, 84). He stated that he had confidence in his attorney and let him handle everything (R. 60). It may be assumed that the attorney knew that a sheriff cannot bind a judge either to grant or deny probation, and that he informed petitioner of this fact. Cf. *United States* v. *Sturm*, 180 F. 2d 413, 416 (C.A. 7). Hence, even if petitioner had adduced proof in the district court that the sheriff made such a statement, that proof would not invalidate his plea of guilty. At most, such proof would show only that petitioner had had false hopes that the judge would heed the sheriff's suggestion. "A mere disappointed expectation of great leniency does not vitiate a plea." *Thomson* v. *Huff*, 149 F. 2d 842, 843 (C.A. D.C.). Since the facts set forth in the supplemental affidavit did not warrant a result different from that

reached by the Court of Appeals in its original decision, *i.e.*, that the Kansas conviction was valid, there was no sound reason to grant the petition for rehearing.

CONCLUSION

For the foregoing reasons, it is respectfully submited that the petition for a writ of certiorari should be denied.

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